SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Rhyno*, 2018 NSSC 298

Date: 2018-12-06
Docket: CRH No. 481792
Registry: Halifax

Between:

Her Majesty the Queen

v.

Nicole Rhyno

LIBRARY HEADING

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	November 20, 2018, in Halifax, Nova Scotia
Written Decision:	December 6, 2018
Subject:	Section 771 *Criminal Code* – forfeiture of bail monies
Summary:	After being charged with a multiplicity of serious offences under the *Controlled Drugs and Substances Act*, Ms. Rhyno was released on a recognizance with $8000 pledged (no cash deposit required) by her and her surety. She breached her house arrest condition, while she was living with her surety Mr. Miles. He was at work when she left the house and became "high" on drugs. He returned home to find her absent. He did not call the police. She called him and suggested she was on her way to the hospital because of breathing difficulties. This was a ruse. He did not call the police. She returned approximately two hours after he had been in the house upon return from his work, and three hours or more after she left the house. She was convicted and sentenced to what is effectively a 15-day sentence. The Crown sought that she forfeit $3500, and Mr. Miles forfeit $2000.

Issues:

(1) Was the breach of release conditions established beyond a reasonable doubt?

(2) Did either Ms. Rhyno or Mr. Miles show cause why they should not be held to have forfeited some portion of the $8000 they pledged?

Result:

(1) The breach was established beyond a reasonable doubt. The presumption that Mr. Miles's understood his basic obligations, was not displaced. The starting point is full forfeiture of the bail monies unless the principal and surety can "show cause" why it should not be so.

(2) For a principal, one should look to the circumstances of the breach (including if new free-standing criminal offences were committed, and any effect on the originating criminal proceedings) as well as the personal circumstances of that person. For a surety, one should consider whether they were complicit by aiding or abetting the commission of the breach, or were not diligent in supervising the principal, as well as their financial means, etc. Ultimately, the court should ask itself: What is the minimum level of forfeiture of monies required to maintain the "pull of bail" among principals and sureties in the future? While generally to preserve the "pull of bail" a strong case can be made for courts to "harden their hearts" and presume forfeiture of entire amounts of small ($5000 or less) pledges made by principals and their sureties when breaches of bail conditions occur, each case must be determined on its own facts. In these circumstances it was in the interests of justice, for:

a. Ms. Rhyno, who had received an effective sentence of 15 days custody for the s. 145(3) breach, that she forfeit $1000; and

b. Mr. Miles, who was not diligent after he became aware of Ms. Rhyno's absence from the residence – that he forfeit $500.

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Applicant

v.

Nicole Rhyno and Trevor Miles

Respondents

Judge:	The Honourable Justice Peter Rosinski
Heard:	November 20, 2018, in Halifax, Nova Scotia
Counsel:	Christian Girouard for the Federal Crown Nicole Rhyno, Respondent Trevor Miles, Respondent

By the Court:

Introduction

[1] Ms. Rhyno, who is presently 36 years old, was released on a recognizance[1] on July 25, 2018 in the amount of $8,000 (no deposit required) in relation to two sets of serious charges under the *Controlled Drugs and Substances Act:*

> 1. the first group of which were allegedly committed March 28, 2018 in Dartmouth, contrary to:
>
> Sections 5(2) hydromorphone; 4(1) cocaine; 4(1) possession in excess of 30 g of cannabis resin; and 7.1(1) possession of equipment used in the trafficking and production of crack cocaine; and
>
> 2. the second group of which were allegedly committed July 20, 2018 in Dartmouth, contrary to:
>
> Sections 4(1) hydromorphone, 5(2) cocaine, 5(2) possession for the purpose of trafficking not in excess of 3 kg cannabis resin, 5(2) possession for the purpose of trafficking not in excess of 3 kg of cannabis resin, 5(2) oxycodone, 5(2) Alprazolam, s. 7(1) production of cocaine, and. 7.1(1) possession of equipment used in the trafficking and production of cocaine.

[2] These charges remain outstanding at present. According to the recognizance conditions, Ms. Rhyno was under house arrest, and required to reside with her surety, Mr. Trevor Lee Joseph Miles, who is presently 57 years old, at his apartment on 275 Windmill Road, Dartmouth. He had known her for 2 to 3 years and believed she deserved a chance to be at large pending her trials. There were minimal exceptions to house arrest, and none of them are applicable here. During that time period, Mr. Miles was steadily employed as a carpenter. Specifically, on August 29, he was working from approximately 7:00 a.m. until 7:00 p.m. in the area of the Penhorn Mall, Dartmouth, Nova Scotia.

[3] When Mr. Miles returned home at 7:00 p.m., he discovered Ms. Rhyno was absent. Hoping that she would return shortly, he did not immediately call to report her absence. She had been on release since July 25 without incident. She was not permitted, as a condition of a recognizance, to be in possession of a cell phone or pager. As he was about to call the police to report her absence, he received a call from her at approximately 7:20 p.m., wherein she stated she was having trouble

[1] In Ontario, one finds a trend that questions what appears to be an over-use of sureties in the first instance, and the generalized lack of adherence to the "bail ladder" procedure set out in *R. v. Antic*, 2017 SCC 27: See Justice DiLuca's comments in *R. v. Tunney*, 2017 ONSC 961, at paras. 4-5 and 19-21; 35-38; 39-42; and 51-57.

breathing and on her way to the hospital I conclude that he knew this was a ruse. He did not call the police thereafter.

[4] She initially testified that "Trevor was out for a minute – I took off – I got caught – no real reason – around suppertime". In cross-examination she clarified that she left the home "around suppertime" because she "wanted to get high". Mr. Miles was not there when she left, and he was working late.

[5] By 9:00 p.m. she was just outside the apartment building returning when police arrested her for failure to comply with her house arrest condition. She remained in custody until September 7, at which time she pled guilty to a summary-conviction-elected breach of recognizance, s. 145(3) *Criminal Code of Canada*. She was given credit for one day served in custody for her appearance that day, and for seven days in custody otherwise, for what the sentencing judge considered an effective total sentence of 15 days in custody.[2]

[6] The Crown seeks that she forfeit $3500 of the $8000 she pledged and that Mr. Miles forfeit $2000 of the $8000 he pledged.

The applicable statutory and jurisprudential law

[7] His Honour, Judge Ian Palmeter (Co.Ct) summarized the law in *R v Kelsey*, [1989] N.S.J. No. 73 as follows:

> The law regarding judicial interim release and the forfeiture of a recognizance is, in my opinion, clear. Parliament, in its wisdom, has determined under Section 515(1) of the Criminal Code that an accused person shall be released upon such undertaking with or without conditions unless the prosecutor can show that the detention of the accused is justified under one of or both grounds set forth in Section 515(10) of the Code. In this case, a Judge of the Supreme Court determined that the accused was not required to be detained under either the primary or secondary ground set out in Section 515(10) of the Code,and ordered him released on the terms of the said recognizance.
>
> Where a recognizance has been broken, Section 771 of the Code sets forth the proceedings in case of default. The Section reads as follows:
>
> > 771.(1) Where a recognizance has been endorsed with a certificate pursuant to section 770 and has been received by the clerk of the court pursuant to that section,

[2] Regarding the range of sentence for indictably-elected breaches see: *R. v. Young*, 2014 NSCA 16; and for summary conviction elected breaches: *R. v. Gabriel*, 2018 NSSC 252, at paras. 50-56.

> a) a judge of the court shall, on the request of the clerk of the court or the Attorney General or counsel acting on his behalf, fix a time and place for the hearing of an application for the forfeiture of the recognizance;
>
> and
>
> b) the clerk of the court shall, not less than ten days before the time fixed under paragraph (a) for the hearing, send by registered mail [at present the section includes here "or have served in the manner directed by the court or prescribed by the rules of court"] to each principal and surety named in the recognizance, directed to him [at present it reads "the principal or the surety"] at the address set out in the certificate, a notice requiring him ["the person"] to appear at the time and place fixed by the judge to show cause why the recognizance should not be forfeited.

(2) Where subsection (1) has been complied with, the judge may, after giving the parties an opportunity to be heard, in his discretion grant or refuse the application and make any order with respect to the forfeiture of the recognizance that he considers proper.

(3) Where, pursuant to subsection (2), a judge orders forfeiture of a recognizance, the principal and his sureties become judgment debtors of the Crown, each in the amount that the judge orders him to pay.

(3.1) An order made under subsection (2) may be filed with the clerk of the superior court [at present the section includes here "and if an order is filed, the clerk shall issue a writ of *fieri facias* in Form 34 and deliver to the sheriff of each of the territorial different divisions in which the principal or any surety resides, carries on business or has property"] or, in the Province of Quebec, the prothonotary and, where an order is filed, the clerk or the prothonotary shall issue a writ of *fieri facias* in Form 34 and deliver it to the sheriff of each of the territorial divisions in which the principal or any of his sureties resides, carries on business or has property.

(4) Where a deposit has been made by a person against whom an order for forfeiture of a recognizance has been made, no writ of *fieri facias* shall issue, but the amount of the deposit shall be transferred by the person who has custody of it to the person who is entitled by law to receive it."

It is clear that subsection (2) gives complete discretion to the judge hearing the application.

In my opinion, the sanctity of a bail recognizance must be preserved. The public expect this and it is up to the courts to ensure that the law is obeyed in respect to such recognizances. The leading case on the criteria to be followed in determining whether a recognizance should be forfeited is **R. v. Southampton Justices, ex parte Green**, (1975) 2 All. E.R. 1073, which is a decision of Lord Denning of the Court of Appeal. Counsel for both parties referred extensively to this case and **I accept it as the leading authority on this type of application.** It

> is not necessary to go into the factual situation of R. v. Southampton Justices, but to quote Lord Denning at p. 1077:
>
> > **By what principles are the justices to be guided? They ought, I think, to consider to what extent the surety was at fault. If he or she connived at the disappearance of the accused man, or aided it or abetted it, it would be proper to forfeit the whole of the sum. If he or she was wanting in due diligence to secure his appearance, it might be proper to forfeit the whole or a substantial part of it, depending on the degree of fault. If he or she was guilty of no want of diligence and used every effort to secure the appearance of the accused man, it might be proper to remit it entirely.**
>
> The Southampton Justices case has been followed by courts in Canada. The Newfoundland Supreme Court in the case of Regina v. Andrews, Vol. 34, C.R.N.S. 344, placed great reliance on that case. At p. 347 Furlong, C.J. states:
>
> > It seems to me that this whole question of the exercise of discretion has been spoken to with great authority by Lord Denning M.R. in a recent English case, Regina v. Southampton Justices, (1975) 2 All. E.R. 1073.
>
> Justice Furlong then goes on to quote the passage of Lord Denning to which I have previously referred. In Nova Scotia our courts have considered this test of discretion. In the case of Her Majesty the Queen v. Emilio Bucchianico, Donald Charles Downey and Wayne Alexander James, June 15, 1988, C.R. 10206, (unreported), His Honour Judge N.R. Anderson of the County Court referred to the test in R v. Southampton Justices, supra, with approval.
>
> At the time of the application I noted that there were **three alternatives open to me. I could order forfeiture of the entire bond, or I could order forfeiture of part of the bond, or I could remit the recognizance entirely. I stated, that in order for me to forfeit the entire bond I would have to find aiding and abetting the default, or a complete negligence on the part of the respondents.**
>
> [My bolding and commentary added]

[8] I should add here that later cases suggest that the courts "should harden their hearts against a plea of lack of culpability when it turns out that the surety's trust in the accused was misplaced". For example, in *United States of America v. Le*, 2010 BCSC 1653, Justice Maisonville, citing the English cases relied on by Judge Palmeter in *Kelsey*, including the above-noted quotation, went on to elaborate:

> The rigorous approach [i.e. that only in exceptional cases should courts order anything less than full forfeiture of bail monies] must be the starting point in the estreatment proceedings… while the starting point is the rigorous approach, it remains a matter of great discretion as to whether to grant or refuse the application or make any order with respect to the forfeiture." (paras. 34-35)
>
> [my inserted elaboration]

[9] In *R. v. Antic*, 2017 SCC 27, Justice Wagner (as he then was) stated for the court:

> 54 The bail review judge erred in making his decision on the basis of such conjecture. A justice or a judge cannot impose a more onerous form of release solely because he or she speculates that the accused will not believe in the enforceability of a surety or a pledge. **The bail system is based on the promises to attend court made by accused persons and on their belief in the consequences that will follow if such promises are broken. As Rosenberg J.A. rightly observed, "if accused came to believe that they could fail to attend court without their sureties suffering any penalty, the surety system would be ineffective**": *Canada (Minister of Justice) v. Mirza*, 2009 ONCA 732, 248 C.C.C. (3d) 1, at para. 41.
>
> [my bolding added]

[10] In *Canada (Attorney General) v. Horvath*, 2009 ONCA 732,[3] the five members of the Panel, speaking through Justice Rosenberg, stated:

> 36 However, despite this hesitance to forgive entirely a recognizance entered into by a surety, the English cases confirm that the statutory provisions confer a broad discretion on the justices and that the surety's diligence is a relevant consideration when determining the amount of forfeiture. Butler-Sloss L.J. put it this way in *ex parte Lever*, at p. 38:
>
> > The presence or absence of culpability is a factor but the absence of culpability, as found in this case by the judge, is not in itself a reason to reduce or set aside the obligation entered into by the surety to pay in the event of a failure to bring the defendant to court. The court may, in the exercise of a wide discretion, decide it would be fair and just to estreat some or all of the recognisance.
>
> 37 To a similar effect are the reasons of Hoffman LJ, also in *ex parte Lever*, at p. 41:
>
> > The court has a broad discretion to remit the forfeiture of all or part, but the burden is upon the surety to satisfy the court that this is what the justice of the case requires.
> >
> > In considering the justice of the case, the lack of culpability of the surety and the negligence of the police were matters to be taken into account.
>
> 38 This same approach has been adopted in other countries. For example, in Baytieh v. State of Queensland, [1999] Q.C.A 466, at para. 12, the Queensland

[3] Which remains the law in Ontario: *R v Wilson*, 2017 ONCA 229, per Epstein JA at paras. 21 – 25. I find it helpful to cite lengthy portions of this highly regarded decision; see also *R. v. Flanders*, 2015 BCCA 33, at para. 22; *R. v. Thomas*, [2016] N.J. No. 105, per McGrath J., at paras. 43-49.

Court of Appeal held that it will only be in rare circumstances that the entire amount of the recognizance would be forgiven, "given the importance of ensuring the integrity of the surety system". But, the court agreed that the surety's degree of fault was a relevant consideration: para. 13. Other considerations that the court found to be relevant included financial hardship experienced after the recognizance was entered into and the reasonableness of the surety's expectation that the accused would comply with the bail conditions. The court otherwise considered that it would be unwise "to attempt a definitive statement of the considerations which may be relevant to this question": para. 15. To a similar effect are decisions from New Zealand (R. v. Hopewell, in re Langford, [1958] N.Z.L.R. 523) and from the State of Victoria (Re Condon, [1973] V.R. 427; Mokbel v. D.P.P. (Vic) and D.P.P. (C'th) (2006), 14 V.R. 405).

…

The "Pull of Bail"

40 For the purposes of this case, the most important point that comes from the English cases is what is referred to as the "pull of bail". In *ex parte Lever*, at pp. 38 & 41, Butler-Sloss and Hoffman L.J.J. referred with approval to the following statement from Lord Widgery C.J. in *R. v. Southampton Justices, ex parte Corker* (1976), 120 S.J. 214, as quoted from the full transcript contained in *R. v. Uxbridge Justices, ex parte Heward-Mills*, [1983] 1 All E.R. 530, at p. 532 :

> The real pull of bail, the real effective force that it exerts, is that it may cause the offender to attend his trial rather than subject his nearest and dearest who has gone surety for him to undue pain and discomfort.

41 *I agree that the "pull of bail" is an important factor that serves as a reminder that, in attempting to do what is just and fair towards the sureties, the courts must be careful not to undermine the effectiveness of the bail system. Our system depends upon accused attending court and if accused came to believe that they could fail to attend court without their sureties suffering any penalty, the surety system would be ineffective. As Justice Trotter notes, at p. 461 of his text, the effect of potential forfeiture" would be seriously diluted by widespread knowledge that the procedure is only invoked sporadically*." An overemphasis on the surety's lack of fault could undermine the "pull of bail" and have an adverse impact on the criminal justice system, which depends upon the accused complying with release conditions. The applicant submits that, in order to avoid such a result, the degree of fault attributable to a surety for an accused who has breached the terms of the recognizance should not play a role in determining the amount of the recognizance that should be forfeited.

42 Courts in Canada that have adopted a broad discretionary approach have referred to a number of factors in considering whether to relieve against forfeiture. The reasons of Durno J. in *R. v. Nguyen*, [2007] O.J. No. 5321, at para. 12, contain a list of the factors courts have taken into account on forfeiture applications.

43 *In considering what the appropriate test on a forfeiture application is, I recognize the preeminent importance of preserving the "moral pressure" (Trotter at p. 460) or "pull of bail*", so as to ensure that the accused complies with the bail conditions, especially the condition that the accused appear in court or surrender into custody as required.

44 *However*, despite the importance of the "pull of bail*", I do not agree* with the Minister and the Crown intervenors *that the only way to ensure the effectiveness of the system is to adopt a rigid rule of total forfeiture absent exceptional circumstances*. Such an approach is inconsistent with the broad discretion implied by the words of s. 771(2): "may ... *in his discretion* grant or refuse the application and *make any order* with respect to the forfeiture of the recognizance *that he considers proper*" (emphasis added).

45 *The pull of bail can sometimes be vindicated by something less than total forfeiture*. The Mirza case which involves a substantial sum, is an obvious example. It is not necessary to order forfeiture of the entire $500,000, an amount the Mirzas cannot possibly pay, to ensure the effectiveness of the bail system. *Ordering forfeiture of a substantial sum that would entirely wipe out any equity that they have in their home would surely be more than sufficient.*

46 *On the other hand, in the vast majority of cases, which involve relatively small sums, probably nothing less than total forfeiture would suffice to vindicate the pull of bail*. Statistics gathered by the Public Prosecution Service seem to support this approach. Those statistics show that in a period of just over a year there was total forfeiture in approximately 93 percent of all surety bails for which the Crown sought forfeiture. Most of these recognizances were in amounts of $5,000 or less. The statistics do not reveal whether the sureties attended the forfeiture hearings.

47 *Three further concerns also lead to the conclusion that the diligence of a surety is a relevant consideration in forfeiture hearings. First, the* right to reasonable bail is a constitutional guarantee, and as sureties have become an integral part of the bail system and an important means of ensuring that constitutional imperative (see Trotter at pp. 277, 283-84; R. v. Dodson (2000), 142 C.C.C. (3d) 134 (Ont. C.A.), at para. 43), *we should avoid an approach that would unduly discourage sureties from coming forward. There may now be an over reliance on sureties*. Thus, see the comments of Professor Friedland in "Criminal Justice in Canada Revisited" (2004), 48 C.L.Q. 419 at 433-34:

> The present system is, however, not working well in Ontario. The pendulum has swung too far in the direction of requiring sureties rather than using release on one's own recognizance. In England, sureties are required in only a small fraction of the cases. About two thirds of those who appear for a bail hearing in Toronto today are required to find sureties and only about half of this number are actually released. The other half, it appears, could not find acceptable sureties. Less than 10% held for a bail hearing are released on their own undertaking or recognizance.

> What appears to be happening is that the requirement to find sureties has taken the place of cash bail as a method of holding accused persons in custody. The majority of persons who are caught up in the criminal justice system, many of whom are not from the community where they are arrested, have difficulty finding sureties.

48 Be that as it may, without sureties more accused could be detained pending trial or appeal: *Millward* at para. 26. The court must not be so inflexible in their exercise of discretion that responsible sureties are discouraged from coming forward. *That could well be the case if the surety's due diligence were considered to be irrelevant.* In other words, the focus on the forfeiture application cannot be solely on the impact of forfeiture on the accused. Sureties are expected to supervise the accused; *it is unreasonable and unfair to completely ignore their efforts on a forfeiture hearing*.

49 *Second*, while forfeiture proceedings have some similarity to civil proceedings, the proceedings are part of the criminal justice system and the court *cannot lose sight of the fact that the ultimate enforcement procedure, even if seldom invoked, is imprisonment. It would be unjust to ignore the degree of fault attributable to a surety when there is a possibility that they could be imprisoned.*

50 *Third, sureties rarely receive independent legal advice*, as they would when entering into similar obligations in a civil context. *The sureties may have a very limited understanding of the extent of their obligations*. Principles relating to enforcement of guarantees in the civil context are of limited assistance in understanding how the forfeiture process should operate in the criminal context.

51 On the other hand, the diligence of the surety is only one factor relevant to a forfeiture hearing. In the end, the judge must attempt to balance various considerations in exercising the discretion conferred by s. 771(2). I do not think it is helpful or even possible to develop an exhaustive list of the factors that the judge should take into account in exercising this discretion. Further, not all factors will be of equal relevancy or weight in all cases**. A review of the cases does, however, show that there are categories of factors that the courts regularly take into account, including: the amount of the recognizance; the circumstances under which the surety entered into the recognizance, especially whether there was any duress or coercion; the surety's diligence; the surety's means; any significant change in the surety's financial position after the recognizance was entered into and especially after the breach; the surety's post-breach conduct, especially attempts to assist the authorities in locating the accused; and the relationship between the accused and the surety.**

52 Before turning to the particular applications at issue in this matter, I would make three remarks relevant to forfeiture proceedings generally. **As noted above, the onus is on the surety to show why full forfeiture of the recognizance should not be ordered. The circumstances relevant to the exercise of the court's discretion to relieve against full forfeiture are largely within the**

> **knowledge of the surety**. Sureties asserting that they should be relieved from forfeiture of any amount of the recognizance have the obligation to adduce credible evidence to support their position. The courts should also take into account that the Crown will often not be in a position to adduce evidence to refute those claims.
>
> 53 Second, when hearing forfeiture applications, courts should remember that a bail order is a court order, and *it is not open to the surety to mount a collateral attack on the appropriateness of that order*. There was some hint of this approach in the Mirza case, the suggestion being that the $500,000 surety was out of proportion to the nature of the fraud and was excessive. There were procedures in place that Adnan or his sureties could have utilized if they considered the order to be inappropriate. Adnan could have sought review of the order. Additionally, of course, the Mirzas were not required to enter into the recognizance, and even after having done so they could have applied to be relieved as sureties in accordance with ss. 766 and 767 of the Criminal Code.
>
> 54 Finally, it appears that *it is open to the court to make a conditional order that the recognizance be forfeited unless the accused is taken into custody by a certain date: see Miller.*
>
> [My emphases added]

[11] For completeness, I will recite the following relevant sections of the *Criminal Code*:

> 772
>
> 1) Where a writ of *fieri facias* is issued pursuant to section 771, the sheriff to whom it is delivered shall execute the writ and deal with the proceeds thereof in the same manner in which he is authorized to execute an deal with the proceeds of writs of *fieri facias* issued out of superior courts in the province in civil proceedings.
>
> 2) Where this section applies the Crown is entitled to the costs of execution and of proceedings incidental thereto that are fixed, in the province of Québec, by any tariff applicable in the Superior Court in civil proceedings, and in any other province, by any tariff applicable in the superior Court of the province in civil proceedings, as the judge may direct.
>
> 773
>
> 1) Where a writ of *fieri facias* has been issued under this Part and it appears from a certificate in a return made by the sheriff that sufficient goods and chattels, lands and tenements cannot be found to satisfy the writ, or that the proceeds of the execution of the writ are not sufficient to satisfy it, a judge of the court may, upon application of the Attorney General or counsel acting on his behalf, fix a time and place for the sureties to show cause why a warrant of committal [imprisonment] should not be issued in respect of them.

2) Seven clear days notice of the time and place fixed for the hearing pursuant to subsection (1) shall be given to the sureties.

3) The judge shall, at the hearing held pursuant to subsection (1) inquire into the circumstances of the case and may in his discretion

    a) order the discharge of the amount for which the surety is liable; or

    b) make any order with respect to the surety and to his imprisonment that he considers proper in the circumstances and issue a warrant of committal in Form 27.

Stage I – establishing a breach of the release condition(s)

[12] In the case at bar, the court is in receipt of a Certificate of Default to be endorsed on Recognizance (Form 33 pursuant to subsection 770(1) *Criminal Code of Canada*) signed by Her Honour, Provincial Court Judge Alanna Murphy. Attached to, and in support of, the Crown's application are certified copies of the informations regarding the March 28, 2018 offences, the July 20, 2018 offences, the August 29, 2018 offence, and a Certificate of Conviction regarding her breach of the house arrest condition on August 29, 2018.

[13] I am satisfied that the Crown has established a breach of the recognizance beyond a reasonable doubt.[4]

[14] Otherwise generally, it falls to Ms. Rhyno as principal, and Mr. Miles as surety, to satisfy the court on a balance of probabilities of any facts they seek to rely on to establish that the court should not declare as forfeited all, or alternatively any portion, of the $8,000 pledged by them.

[15] Ms. Rhyno pleaded guilty, and thereby acknowledged she intentionally breached her bail condition. Mr. Miles bears the onus to show cause why he should not be responsible to forfeit any amount of the $8,000 he pledged. I conclude he

[4] Including that the surety "understood basically what his obligation was" when the court considers whether to order forfeiture as against the surety, per Hall Co. Ct. Judge at para. 14 in *R v Ross*, [2002] NSJ. No. 568; see also Judge Hall's reliance on other cases at paras. 12-21 in *R v L.E.B.*, [2000] NSJ. No. 237, particularly see para. 15 regarding the reasonable doubt standard applied to a surety's understanding of their obligations under a recognizance.
I conclude that at law, the "presumption of regularity" is applicable in cases where sureties have signed bail documents. That presumption has not been rebutted here. Therefore, I find that "everything is presumed to be rightly and duly performed until the contrary is shown" by court staff assisting this surety in response to any suggestion by Mr. Miles that he had raised a reasonable doubt regarding a claimed material misunderstanding of his basic surety obligations, and potential consequences for him in the event of a breach by the principal – see *R. v. Molina* (2008) 90 O.R. (3d) 223 (CA), paras.10-14, cited by Farrar, J. (as he then was) in *R. v. Guilbault*, 2010 NSSC 26.

did not act diligently once he discovered Ms. Rhyno was absent from the residence.

The appropriate amount, if any, to be forfeited here

[16] It is vitally important when accused persons and sureties commit themselves to comply with conditions of release, that they fully appreciate the serious consequences that could befall them if a breach of those conditions by the accused person is established. They could be "on the hook" for the entire amount they pledged as a debt to the government. If their income and assets are insufficient to satisfy the debt, the *Criminal Code* does permit a judge to hold a hearing to decide whether they should be imprisoned for their failure to pay the amounts owing.

[17] I reiterate what Judge Palmeter said in *Kelsey*:

> In my opinion, the sanctity of a bail recognizance must be preserved. The public expect this, and it is up to the courts to ensure that the law is obeyed in respect to such recognizances.

[18] On the other hand, each case must be determined on its own facts. In my opinion, the starting point is full forfeiture and if that appears unnecessary, courts should ask themselves: What is the least amount of forfeiture that would likely *not* undermine the "pull of bail" in other cases?

Ms. Rhyno

[19] She had long-standing and very serious substance abuse issues at the material times. She also had been released on very serious charges. She agreed to comply with these conditions while on release. She did so until August 29, 2018. The extent of her breach was to not be present at Mr. Miles's apartment under house arrest between approximately 6:00 and 9:00 p.m. that evening; and that she went out "to get high". I infer that she came back in that condition at or about 9:00 p.m. and was immediately arrested. She was sentenced to effectively 15 days custody for the breach.

[20] In spite of her breach, she still remains at large on release conditions. She resides with the father of her children. Her present financial circumstances include her employment at near minimum wage on a weekly full-time basis. She has a notional financial obligation for two teenaged children. The main charges herein still remain to be resolved.

[21] In effect, I have three alternatives – I could order forfeiture of the entire amount; or I could or order forfeiture of part of the amount; or I could remit the recognizance entirely and order no amount payable by Ms. Rhyno.

[22] It is not appropriate to order forfeiture of the entire amount. In my opinion, that is not necessary in order to maintain the "pull of bail" in other cases.

[23] Although in this context, forfeiture of monies is superficially distinct from incarceration, notionally if monies ordered forfeited are not recovered by the Attorney General, a principal could be liable to incarceration pursuant to section 773 of the *Criminal Code*. While this is unlikely, the possibility still exists.[5] Therefore, a real risk exists in cases such as this one, that forfeiture of monies may effectively constitute a form of "double" or disproportionate punishment.[6]

[24] On the other hand, it is not appropriate to remit the recognizance entirely and order no amount payable by Ms. Rhyno. If this became a common practice when a principal has already been punished by a sentence under the *Criminal Code*, then it would not provide an additional incentive to the accused to abide by the bail conditions, as well as to the surety whose obligation it is to diligently supervise the accused so as to minimize the chances of breaches of the bail conditions by an accused.

[25] I consider that: Ms. Rhyno absented herself from the home during her house arrest for only three hours; committed no other offences under the *Criminal Code of Canada*; voluntarily returned to the home, although intoxicated from unknown drug(s); and that she was sentenced on the breach of her house arrest condition to an effective sentence of 15 days in custody; she will have very modest means to pay any forfeited amount, and may very well be unable to do so, and face further imprisonment pursuant to section 773 of the *Criminal Code*; she has notional financial obligations for two teen-aged children.

[26] In my opinion, this is a proper case for forfeiture of $1000, of the $8000 she pledged in her recognizance. I will permit her to pay this amount on or before December 31, 2020.

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[5] I also consider that there is no appeal from my decision on forfeiture – *R. v. Gervais*, 2017 ABCA 324, per Strekaf, J.A. in chambers (para. 5)

[6] See Judge Hall's comments in *Ross* regarding a principal (para. 16) and in *L.E.B.* (para. 23).

Trevor Miles

[27] It is not appropriate to order forfeiture of the entire amount.[7]

[28] He stepped forward when, I presume, no one else would or could. He took a chance on Ms Rhyno. He was successful in his supervision of her between July 25 and August 28. It was not unreasonable for him to be at work on August 29 between 7:00 a.m. and 7:00 p.m., without having someone supervise Ms. Rhyno in his absence. However, when he returned at 7:00 p.m. and she was not present, if he wished to protect his own interests he had an immediate obligation to call the police and report her as absent from the premises. She left no note or other indication that she was absent from the premises for any legitimate purpose. When she called him at 7:20 p.m. to advise she was having breathing difficulties and going to the Dartmouth General Hospital, I conclude he either knew, or was wilfully blind to, the fact that Ms. Rhyno was likely involved with illegal drugs again while absent from the home. Yet still he did not call the police. While he did not aid or abet Ms. Rhyno in breaching the condition of her release, during that short time interval, he was not diligent in his obligations to do what he could to prevent any further breaches, and to reduce the extent of any individual breaches Ms. Rhyno might commit while absent from the home.

[29] Although steadily employed as a carpenter, his financial circumstances are limited. He is presently separated and pending a divorce. He has notional financial obligations for his two teen-aged children.

[30] In my opinion, this is a proper case for forfeiture of $500, of the $8,000 he pledged in support of Ms. Rhyno. I will permit him to pay this amount on or before December 31, 2019.

Rosinski, J.

[7] In *R. v. McNeish* [1989] O.J. No. 681, ACJHC Callaghan stated" It is a rare case indeed where a total surety is estreated. Usually in such cases one finds connivance on the part of the applicant [i.e. the principal], or lack of diligence in maintaining or exercising the obligations of the surety, or failure to properly advise authorities when the accused principal has left the jurisdiction." – Although overturned on appeal on a matter of law ([1990] O.J. No. 210), I accept that the statement remains accurate, as cited by Judge Hall in *Ross* supra, at para. 15.